# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1954

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## No. 368

## JOSEPH P. MARCELLE, PETITIONER,

vs.

## ESTATE OF RAYMOND LUPIA, BRUNO LUPIA AND AMELIA LUPIA, EXECUTORS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States Court of Appeals for the Second Circuit

ESTATE OF RAYMOND LUPIA, BRUNO LUPIA AND AMELIA LUPIA, EXECUTORS, PLAINTIFFS-APPELLEES,

*against*

JOSEPH P. MARCELLE, DEFENDANT-APPELLANT.

STATEMENT UNDER RULE 15(b)

The suit was commenced March 13, 1952. It is an action to recover income taxes paid by the plaintiffs for the year 1945.

The defendant's answer was filed September 26, 1952.

On October 4, 1952, the plaintiffs moved for summary judgment. The motion was granted by the Hon. Mortimer W. Byers, District Judge, in an opinion dated January 2, 1953.

On January 27, 1953, an order was entered granting summary judgment in favor of the plaintiffs.

Notice of Appeal was filed March 5, 1953.

Leon London, Esq., 271 Madison Avenue, New York, N. Y., appears for the plaintiffs.

Frank J. Parker, United States Attorney for the Eastern District of New York, 271 Washington Street, Brooklyn, New York, appears for the defendant.

2 In United States District Court, Eastern District of New York

[Title omitted]

COMPLAINT—March 13, 1952

Plaintiffs, complaining of the defendant, allege:

1. That at all the times hereinafter mentioned Bruno Lupia and Amelia Lupia were the duly appointed executors of the Estate of Raymond Lupia, Deceased.

2. The aforementioned executors are, and at all the times hereinafter mentioned, were citizens of the United States and of the State of New York, and now reside at 145-35 Bayside Avenue, Flushing, Queens County, City and State of New York.

3. Defendant was at all times hereinafter mentioned Collector of Internal Revenue for the First District of New York.

4. The action arises under the Internal Revenue Laws of the United States relating to income taxes and under Section
3 1340 of the Judicial Code and Judiciary of the United States (28 U. S. C. A., Section 1340).

5. That heretofore and on or about December 1, 1942, Metro Coat & Suit Company, a limited partnership, was duly formed

under the Partnership Laws of the State of New York by Bruno Lupia, Sol Beck, William Cornet and Joseph Lupia, as general partners, and Amelia Lupia, Raymond Lupia, Olga Lupia and Albert Lupia, as limited partners, to engage in the manufacture of women's coats and suits. The term of the aforesaid partnership was from December 1, 1942 to January 31, 1944.

6. That articles of limited partnership were executed in accordance with the Partnership Law of the State of New York and all other formalities requisite to the formation of a limited partnership, including publication of notice thereof, were properly and duly completed.

7. That on or about July 1, 1943, the partnership agreement was amended so that Raymond Lupia, a special partner, became a general partner, Joseph Lupia, a general partner, became a limited partner and Domenico Pannissidi, Mima Pannissidi, Florence Cornet and Delores Beck became limited partners and the term of the partnership was extended to January 31, 1947.

8. That thereafter on January 7, 1945, Raymond Lupia was killed in action on Leyte Island, Philippine Islands while a member of the armed forces of the United States and under the provisions of his last will and testament his father, Bruno Lupia, and his mother, Amelia Lupia, were named as executors of his estate, and duly qualified as such executors.

4 9. That said Metro Coat & Suit Co., as such limited partnership, was required to and did file its income tax return for the fiscal year ending June 30, 1945, with the U. S. Collector of Internal Revenue for the Third District on Treasury Department form #1065. Said income tax return, a copy of which is annexed hereto and made a part hereof as Exhibit A, indicated the following as the share of income credited to Raymond Lupia (deceased) and the share credited to the Estate of Raymond Lupia for the fiscal year ending June 30, 1945,

| | |
|---|---|
| Raymond Lupia (deceased) ..... | $7,916.61 |
| Estate of Raymond Lupia ..... | 8,184.05 |

10. That the aforesaid income in the amount of $7916.68 credited to Raymond Lupia, deceased, was wholly exempt from income taxation under the Internal Revenue Laws of the United States in effect at that time.

11. That no tax was paid on behalf of the decedent on said income of $7916.68 credited to Raymond Lupia, deceased.

12. That the aforesaid income in the amount of $8184.05 credited to the Estate of Raymond Lupia in the taxable year in which fell the date of decedent's death, was wholly exempt from income taxation under the Internal Revenue Laws of the United States in effect at that time.

13. That on or before the 15th day of March, 1946, plaintiffs filed an income tax return for the calender year 1945 with the United States Collector of Internal Revenue for the First District of New York on Treasury Department form 1041, and said return, hereto annexed as Exhibit B, sets forth the share of income for the calendar year 1945 from Metro Coat & Suit Company at $8184.05.

14. That on or before the 15th day of March 1946, plaintiff erroneously paid to the defendant, as United States Collector of Internal Revenue for the First District of New York, $2,039.52, that amount purportedly representing the tax on $8184.05 of the income of said Raymond Lupia, reported for the calender year 1945, as aforesaid.

15. That thereafter and on or about the 11th day of December 1946, a claim for refund was duly filed with the U. S. Collector of Internal Revenue for the First District of New York on Treasury Department form 843 and such claim, a copy of which is hereto annexed as Exhibit C, sets forth therein the claim of the plaintiffs for refund of the taxes erroneously paid for the calendar year 1945.

16. The plaintiff was not required to pay the aforementioned tax in the amount of $2039.52, or any part thereof, under the Internal Revenue Laws of the United States in effect at that time; the income upon which said tax was paid, was wholly exempt, and not subject to income taxation.

17. That plaintiff erroneously paid said $2039.72, and defendant illegally and erroneously retained and still retains said amount.

18. That no part of said tax, erroneously paid as aforesaid, has been repaid to plaintiff although a claim for refund of said $2039.72 has been duly filed as aforesaid.

19. That more than six months have elapsed since the filing of said claim and the Commissioner of Internal Revenue has failed to act thereon.

WHEREFORE plaintiff demands judgment against the defendant for $2039.72 with interest thereon from the date of payment, the same being the amount illegally and erroneously collected by the defendant from the plaintiff, together with the costs and disbursements of this action.

LEON LONDON,
*Attorney for Complainants,*
*Office & P. O. Address,*
*271 Madison Avenue,*
*New York 16, New York.*

(Duly verified March 6, 1952.)

(Here follow 2-photostats, folios 7-9, 10-31)

# EXHIBIT A TO COMPLAINT

UNITED STATES

FORM 1065
Treasury Department
Internal Revenue Service

# PARTNERSHIP RETURN OF INCOME

1944

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1944
or fiscal year beginning July 1, 1944, and ending June 30, 1945

(File this return with the Collector of Internal Revenue not later than the 15th day of the 3d month following the close of the taxable year)

OFFICE COPY

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

Metro Coat & Suit Company
(Name)

500-7th Avenue
(Street and number)

New York, New York
(City or town, state and number) (State)

Business or Profession

## GROSS INCOME

| | | | | |
|---|---|---|---|---|
| 1. Gross receipts from business or profession | | | $ 1965[illegible] | 68 |
| 2. Less cost of goods sold: | | | | |
| (a) Inventory at beginning of year | 90,793 | 70 | | |
| (b) Merchandise bought for sale | 1[illegible]69,447 | 46 | | |
| (c) Cost of labor, supplies, etc. | 433,375 | 73 | | |
| (d) Total of lines (a), (b), and (c) | 1[illegible]93,616 | 89 | | |
| (e) Less inventory at end of year | 68,550 | 72 | 1726084 | 80 |
| 3. Gross profit (or loss) from business or profession (item 1 less item 2) | | | $ 979280 | 88 |
| 4. Income (or loss) from other partnerships, syndicates, pools, etc. (Show separately name, address and amount) | | | | |
| 5. Interest on bank deposits, notes, corporation bonds, etc. (except interest to be reported in item 6) | | | | |
| 6. Interest on tax-free covenant bonds upon which a Federal tax was paid at source | | | | |
| 7. Interest on Government obligations, etc.: | | | | |
| (a) From Schedule A, line (f) | | | | |
| (b) From Schedule A, line (j) | | | | |
| 8. Rents | | | | |
| 9. Royalties | | | | |
| 10. Net gain (or loss) from sale or exchange of property other than capital assets (Show Schedule B) | | | | |
| 11. Dividends | | | | |
| 12. Other income (State nature of income) Sundry Income | | | 1576 | 49 |
| 13. Total income in items 3 to 12 | | | $ 980756 | 97 |

## DEDUCTIONS

| | | |
|---|---|---|
| 14. Salaries and wages (Do not include compensation for partners) | $ 66646 | 60 |
| 15. Rent | 26080 | 00 |
| 16. Repairs | | |
| 17. Interest on indebtedness (explain on Schedule F) | 22795 | 98 |
| 18. Taxes (explain on Schedule C) | | |
| 19. Losses by fire, storms, shipwreck, or other casualty, or theft (attach schedule) | | |
| 20. Bad debts (explain on Schedule D) | 2590 | 32 |
| 21. Depreciation (explain on Schedule E) | | |
| 22. Amortization of emergency facilities (attach statement) | | |
| 23. Depletion of mines, oil and gas wells, timber, etc. (attach schedule) | 69512 | 65 |
| 24. Other deductions authorized by law (explain on Schedule F) | [illegible] | [illegible] |
| 25. Total deductions in items 14 to 24 | $ [illegible] | [illegible] |
| 26. Ordinary net income (item 13 less item 25) | $ | |
| 27. Net short-term capital gain (or loss) (from Schedule C Summary, line 1, column G) | $ | |
| 28. Net long-term capital gain | | |

7=9

EXHIBIT A, PAGE 5

METRO COAT & SUIT COMPANY

PARTNERS' SHARES OF INCOME & CREDIT.-JUNE 30, 1945

| | NET [illegible] | PARTNERS' SHARES | ORDINARY NET [illegible] | [illegible] |
|---|---|---|---|---|
| Bruno Lupia<br>145-35 Bayside Ave., Flushing, L.I. | 44,101.80 | 6,760.00 | 50,861.80 | 466.59 |
| Amelia Lupia<br>145-35 Bayside Ave., Flushing, L.I. | 44,101.80 | - | 44,101.80 | 466.59 |
| Olga Lupia<br>145-35 Bayside Ave., Flushing, L.I. | 14,700.60 | 1,820.00 | 16,520.60 | 155.53 |
| Raymond Lupia (Deceased)<br>145-35 Bayside Ave., Flushing, L.I. | 7,916.61 | - | 7,916.61 | - |
| Estate of Raymond Lupia<br>145-35 Bayside Ave., Flushing, L.I. | 8,184.05 | - | 8,184.05 | 170.34 |
| Albert Lupia<br>145-35 Bayside Ave., Flushing, L.I. | 14,700.60 | - | 14,700.60 | 155.53 |
| Trust of Bruno Lupia, Jr.<br>c/o Sean Condon, Trustee<br>271 Madison Ave., N.Y.C. | 14,700.60 | - | 14,700.60 | 155.53 |
| Bruno Lupia, Jr.<br>145-35 Bayside Ave., Flushing, L.I. | - | 780.00 | 780.00 | - |
| Dominick Manisidi<br>141-30 85th Rd., Jamaica, L.I. | 14,000.58 | 3,380.00 | 17,380.58 | 146.19 |
| Alma Manisidi<br>141-30 85th Rd. Jamaica, L.I. | 11,200.46 | - | 11,200.46 | 116.36 |
| Saul Book<br>172 West 79th Street, N.Y.C. | 30,801.25 | 6,760.00 | 37,561.25 | 325.88 |
| Dolores Book<br>172 West 79th St., N.Y.C. | 30,801.25 | - | 30,801.25 | 325.88 |
| William Cornet<br>175 West 79th St., N.Y.C. | 22,400.92 | 6,760.00 | 29,160.92 | 237.00 |
| Florence Cornet<br>175 West 79th St., N.Y.C. | 22,400.92 | - | 22,400.92 | 237.00 |
| | 280,011.44 | 26,260.00 | 306271.44 | 2,962.50 |

individual who dies after December 7, 1941, while in active
35 service as a member of the military or naval forces of the United States the tax imposed "by this chapter" shall not apply with respect to "the taxable year in which falls the date of his death". The government takes the position that only the individual is exempt—that his estate remains liable. The complaint which is now attacked by a motion to dismiss is framed on the theory that any tax, whether against the individual or the estate, is abated so long as it covers the taxable year in which falls the date of decedent's death.

The government concedes that there is at least one authority (*Bickerstaff* v. *Allen*, M. D. Ga., 1952, 102 F. Supp. 840) which squarely supports plaintiff's contention. A very narrow question of statutory construction is involved.

As I see it, that question is whether the language of the statute abating taxes for "the taxable year in which falls the date of death" is to be given its normal natural meaning, or whether by unwarranted emphasis upon the word "individual" it is possible to take away with one hand what has been given with the other. The purpose of the enactment, it is clear, was to relieve those dying in the service against the burden of tax for the year in which they died. It would be quite anomalous, no matter what speeches may have been made while the legislation was being framed, to say that this bounty should be withheld so far as the "estate" of the deceased veteran is concerned. I am in complete agreement with what Judge Hoyt says in the *Bickerstaff* case.

The motion is, therefore, denied.

HAROLD M. KENNEDY,
*United States District Judge.*

36 In United States District Court

ORDER DENYING MOTION TO DISMISS—September 19, 1952.

Defendant having moved to dismiss the complaint herein for insufficiency, and good cause appearing, it is

ORDERED that said motion be denied.

HAROLD M. KENNEDY,
*United States District Judge.*

37 In United States District Court

(Title omitted)

DEFENDANT'S ANSWER—Filed September 26, 1952

Joseph P. Marcelle, the defendant above-named, by Frank J. Parker, United States Attorney for the Eastern District of New York, for his answer to the complaint herewith respectfully alleges and shows:

1. That he admits each and every allegation as to Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13 and 19.

2. That he denies each and every allegation contained in Paragraphs 10, 12, 14, 16, 17 and 18, and every allegation in Paragraph 15 of the complaint except he admits that on or about the 11th day of December 1946 a claim for refund was filed with the Collector of Internal Revenue, a copy of which is attached to the complaint, marked Exhibit C.

WHEREFORE, defendant demands judgment against the plaintiff dismissing the action, with costs.

FRANK J. PARKER,
*United States Attorney,*
*Attorney for Defendant.*

38 In United States District Court

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—October 4, 1952

SIR:

PLEASE TAKE NOTICE that the undersigned will move this court at a term for motions to be held at the United States Courthouse, No. 271 Washington Street, Brooklyn, New York, on the 29th day of October, 1952, at 10 A. M., for an order striking out the answer herein, and granting summary judgment to the plaintiffs herein, upon the ground that there is no genuine issue as to any material fact, and plaintiffs are entitled to a judgment as matter of law.

Yours, etc.,

LEON LONDON,
*Attorney for Plaintiffs.*

Dated: New York,
October 4, 1952.

To:

FRANK J. PARKER, ESQ.,
*United States Attorney,*
*Eastern District of New York,*
*Attorney for Defendant.*

39 AFFIDAVIT OF BRUNO LUPIA

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss*:

BRUNO LUPIA, being duly sworn, deposes and says:

I am one of the plaintiffs herein and the father of the deceased Raymond Lupia. I make this affidavit in support of plaintiff's motion for summary judgment.

This is an action to recover $2039.52 in income taxes paid by plaintiffs for the year 1945. It is believed that the defendant will concede the facts which are a matter of documentary evidence in the possession of the defendant.

Plaintiff's testator, United States Army Technical Sergeant Raymond Lupia, #32295014, was killed in action on Leyte Island, Philippine Islands on January 7, 1945. He was a calendar year taxpayer. At the time of his death he was a general partner of Metro Coat & Suit Co., a limited partnership whose tax year ran from July 1, 1944 to June 30, 1945.

40 The tax return of the partnership for the period July 1, 1944 to June 30, 1945, which is annexed to the complaint shows the decedent's share of the partnership income to be $16,000.66 of which $8,184.15 was for the period January 7th to June 30, 1945. The plaintiffs on March 15, 1946 filed a tax return covering the period from January 7, 1945, the date of decedent's death, to December 31, 1945, showing income of $8,184.05 from the partnership, upon which the tax of $2,039.52 was paid.

This suit was brought under Internal Revenue Code Sec. 421, which was added by Section 8 of the Current Tax Payment Act of 1943 (C. 120, 57 Stat. 126) and was amended by the Act of August 5, 1947 (C. 496 62 Stat. 778). The court will note that the latter amendment took place after the date of the decedent's death and of the tax return. As thus amended, Section 1 reads as follows:

"In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations and prior to January 1, 1948—

"(a) the tax imposed by this chapter shall not apply with respect to any prior taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces; and

"(b) the tax under this chapter and under the corresponding title of each prior revenue law for taxable years preceding those

specified in clause (a) which is unpaid at the date of his death
(including interest, additions to the tax, and additional
41-53 amounts) shall not be assessed, and if assessed the assess-
ment shall be abated, and if collected, shall be credited
or refunded as an overpayment."

The claim for refund was filed on December 11, 1946. The application for refund was disallowed on September 14, 1951, as appears from the report of the Internal Revenue Agent in charge dated September 14, 1951, a copy of which is hereto annexed. This action was commenced on March 13, 1952.

As appears from the marked pleadings which will be handed up on the argument, the defendant admits all of the factual allegations of the complaint, but denies their legal effect.

However, the issues of law herein were all resolved in plaintiff's favor by Judge Kennedy on defendant's motion to dismiss the complaint for insufficiency. A copy of Judge Kennedy's opinion denying defendant's motion to dismiss for insufficiency is hereto annexed. It constitutes the law of the case and the motion for summary judgment must be granted.

I am advised by my attorney and verily believe that there are no issues of fact herein and that the law of the case has been settled by Judge Kennedy's decision.

Wherefore I respectfully ask that this motion be granted and that summary judgment be granted in plaintiff's favor, with costs, for all of which no previous application has been made.

(S.) BRUNO LUPIA.

(Sworn to October 8, 1952.)

(Judge Kennedy's opinion appears supra)

54 In United States District Court

(Title omitted)

LEON LONDON, Esq., *Attorney for the Plaintiffs.*
FRANK J. PARKER, Esq., *United States Attorney*
*Eastern District of New York, Attorney for*
*Defendant,*
By: FREDERIC G. RITA, Esq., *Special Assistant to the*
*Attorney General.*

OPINION—January 2, 1953

BYERS, *District Judge*:

This is a plaintiff's motion to strike the answer and for summary judgment according to the prayer of the complaint in an action to recover payment of federal income tax. It was argued on October 29, and decision was deferred at the suggestion of both sides, pending the outcome of an appeal then pending in the Fifth Circuit,
in the case of *Bickerstaff* v. *Allen*, reported in 102 Fed. Supp.
55 840.

That appeal was decided November 29, 1952 and a copy of the opinion reversing the decision of the District Court was filed with the undersigned on December 8, 1952.

The question of law there involved is identical with the one here, and the facts are so closely parallel as to preclude differentiation.

The issue was presented to former Judge Kennedy of this Court on September 3, 1952 in a defendant's motion to dismiss, which was denied by him eight days thereafter (*Lupia's Estate* v. *Marcelle*, 107 Fed. Supp. 552).

His opinion followed the *Bickerstaff* ruling below, and concluded with the observation: "I am in complete agreement with what Judge Hoyt (Chief Judge T. Hoyt Davis) says in the *Bickerstaff* case."

The instant facts are not in dispute:

Raymond Lupia, the decedent above named, a United States Army Technical Sergeant, was killed in action on January 7, 1945.

Lupia filed his income tax returns on a calendar year basis. At the time of his death he was a general partner of Metro Coat & Suit Co., a limited partnership, whose tax year ran from July 1, 1944 to June 30, 1945.

The tax return for the partnership for the fiscal year ended June 30, 1945 shows Lupia's share of the income to be $8,184.05 for the period from January 7, 1945 (the date of Lupia's death) to June 30, 1945.

The plaintiffs filed a "Fiduciary Income Tax Return" for the calendar year reporting that amount, upon which a tax of $2,039.52 was paid.

Plaintiffs now seek a refund of that payment since the income of a soldier is exempt from income taxes for the entire year in
56 which his death occurred, according to 57 Stat. 149, 61 Stat. 778, former Section 421 of the Internal Revenue Code (26 U. S. C. § 421), which reads:

> "Abatement of Tax for Members of Armed Forces Upon Death.
>
> "In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military

or naval forces of the United States or of any of the other United Nations and prior to January 1, 1948—

"(a) the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces; * * *"

In the absence of controlling authority in this Circuit, the present task is deemed to require decision of this case anew, as though there had been no earlier ruling, although the plaintiffs urge that within these pleadings, the law has been settled. If that view were to prevail, despite the course of decision elsewhere, this Court could disclaim any responsibility for the further course of this litigation, which, however convenient, would be scarcely circumspect.

The latest opinion in the *Bickerstaff* case has been studied with care, and no lack of deference is intended by the statement that it does not seem to meet or even discuss the point made in the opinion of Judge Davis in the following language (102 Fed. Supp. 840, at 842):

"Since the serviceman must be deceased before the benefits accrue, his estate could be the only intended beneficiary of the forgiveness feature of the Section."

57 That is the heart of the matter, as Congress was doubtless aware, and is not to be avoided by reference to the estate as a "taxable entity other than the individual serviceman."

It is too clear for argument that Congress intended to stay the hand of the tax gatherer in favor of one who should have paid "the last full measure of devotion" to that Government whose fiscal agent is proverbially inexorable, "with respect to the taxable year in which falls the date of his death." The taxable year was 1945, as has been stated, and since, as Judge Davis observes, the only ones who could possibly derive benefit from the benign aim of the statute would be his beneficiaries, it follows that the purpose should be given effect unless violence thereby would be done to the symmetry of the Revenue Law. No such dire consequence would ensue, as I shall try to show:

The concept of a separate taxable entity known as an estate is a convenience for the administration of the taxing statute. Strictly speaking, there is no such legal entity having existence exterior to this statute, although the Revenue Law speaks as though there were. Thus Mr. Justice Stone in *Hartley* v. *Commissioner*, 295 U. S. 216 at 218:

"The revenue acts consistently treat the estate of a decedent in the hands of an administrator or executor as a separate

taxpayer. By § 2 of the 1921, 1924 and 1926 Acts the estate of a decedent is embraced within the term 'taxpayer.' Each Act specifically provides for taxation of the income of an estate during administration."

So also reads the present statute.

58 It is one thing for the Revenue Law to provide for its own successful administration by the employment of convenient terms and expressions and even artificial concepts, but it does not follow that fundamental principles of law are thereby altered. When a man dies his property, other than real estate, vests in his personal representatives for the purposes of administration and distribution; it is necessary to levy an income tax upon them until that process shall have been completed, but no displacement or repeal of the unrelated principles of general law touching the devolution of property is thereby accomplished.

To call executors or administrators an estate, for purposes of the levy and collection of income tax from them, does not add to nor detract from their true legal status; it may be convenient to label that status for such purposes a taxable entity, but no new jural personality emerges from the process; to reason otherwise is to impart to a convenient medium for the assessment and collection of an income tax an essential quality not requisite to accomplish the obvious purpose, and not within the competency of a taxing statute to create.

In other words, there is no inconsistency involved in giving effect to the provision first above quoted as a mitigation of and supplement to Sec. 161 of the Revenue Code which in (a) (3) provides that the federal income tax applies to "Income received by estates of deceased persons during the period of administration or settlement of the estate." In view of the obvious impossibility of accomplishing the immunity thus proclaimed from income tax in these exceptional circumstances—"with respect to the taxable year in which falls the date of his death"—otherwise than by favoring

59 the beneficiaries of a decedent whose death in active service gives rise to the forgiveness from one year's income tax, a construction compatible with that result becomes inevitable.

This construction is thought to give harmonious effect to the manifest purpose of Congress in all related aspects of the law. Thus the plaintiff's motion to strike the answer, and for summary judgment in their favor, must be granted.

Settle order.

M. W. B.
*U. S. D. J.*

60 In United States District Court

ORDER GRANTING PLAINTIFFS SUMMARY JUDGMENT—January 27, 1953

At Brooklyn, New York, in said district, on the 27th day of January, 1953.

The plaintiffs having moved for summary judgment and the said motion having regularly come on to be heard,

Now, upon reading and filing the notice of motion dated October 4, 1952, the affidavit of Bruno Lupia, duly sworn to October 8, 1952, and the exhibits thereto annexed, and after hearing Leon London, attorney for the plaintiff in support of said motion and Frank J. Parker, United States Attorney, Attorney for the Defendant, by Frederic G. Rita, Special Assistant to the Attorney General, in opposition to the motion, and due consideration having been had thereon and the Court having rendered its decision dated January 2, 1953, it is, in accordance therewith

ORDERED, that the motion be, and the same is hereby in all respects granted; and it is further

ORDERED, that the answer interposed herein by the defendant, be stricken out, and it is further

ORDERED that the plaintiff have and recover judgment against the defendant in the sum of $2,039.72, with interest thereon
61 from March 15, 1946 to January 27, 1953, amounting to $840.33, amounting in all to $2,880.05 and the Clerk of this Court is hereby directed to enter judgment in favor of the plaintiff and against the defendant for said sum of $2,880.05.

MORTIMER W. BYERS,
*United States District Judge.*

62-65 In United States District Court

(Title omitted.)

NOTICE OF APPEAL—March 5, 1953

Please take notice that Joseph P. Marselle, the defendant above-named, hereby appeals to the United States Court of Appeals for the Second Judicial Circuit from the final order and judgment entered herein on January 27, 1953, in favor of the plaintiffs and against the defendant and from each and every part and from the whole thereof.

Dated: Brooklyn, New York,
March 5, 1953.

FRANK J. PARKER,
*United States Attorney,*
*Attorney for Defendant.*

To:

LEON LONDON, Esquire,
*Attorney for Plaintiffs.*
CLERK OF THE UNITED STATES DISTRICT COURT,
for the Eastern District of New York,
United States Court House,
Brooklyn, New York.

66 Clerk's Certificate to foregoing transcript omitted in printing.

67 In United States Court of Appeals for the Second Circuit—

October Term, 1953

No. 19

(Argued May 13, 1954 Decided July 2, 1954.)

Docket No. 22731

ESTATE OF RAYMOND LUPIA, BRUNO LUPIA and AMELIA LUPIA, EXECUTORS, *Plaintiffs-Appellees,*

*v.*

JOSEPH P. MARCELLE, *Defendant-Appellant.*

Before: CHASE, Chief Judge, HINCKS and HARLAN, Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, Mortimer W. Byers, Judge,

granting a motion for summary judgment in favor of plaintiffs in an action for refund of an alleged overpayment in estate federal income taxes. 109 F. Supp. 6 (1953). Affirmed.

68 Leon London, New York City, for plaintiffs-appellees.

Walter Akerman, Jr., Special Assistant to the Attorney General (H. Brian Holland, Assistant Attorney General, Ellis N. Slack, Special Assistant to the Attorney General, and Frank J. Parker, United States Attorney, on the brief), for defendant-appellant.

OPINION

HARLAN, *Circuit Judge*:

This appeal concerns the scope of the relief from income taxation given to individuals who died while serving with our Armed Forces, under former § 421 of the Internal Revenue Code, as amended by the Act of August 5, 1947. 61 Stat. 778, C. 496, 26 U. S. C. A., Cum. Supp. § 421. That Section, the full text of which is printed in the margin,[1] among other things forgives the income taxes of any "individual" who died on or after December 7, 1941 and prior to January 1, 1948, while serving in the Armed Forces of the United States or those of any of the other United Nations, "with respect

69 to the taxable year in which falls the date of his death."

Raymond B. Lupia was killed in action at Leyte, P. I., on January 7, 1945, while serving as a Sergeant in the United States Army. He had filed his income tax returns on a calendar year basis. At the time of his death, Lupia was a member of a partnership which filed its income tax returns on the basis of a fiscal year ending June 30. Upon Lupia's death, the partnership credited to him $7,916.61, being his share of the partnership income to the date of

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[1] "SEC. 421. ABATEMENT OF TAX FOR MEMBERS OF ARMED FORCES UPON DEATH.

"In the case of any individual who dies on or after December 7, 1941, while in active service as a member of the military or naval forces of the United States or of any of the other United Nations and prior to January 1, 1948—

"(a) the tax imposed by this chapter shall not apply with respect to the taxable year in which falls the date of his death, or with respect to any prior taxable year (ending on or after December 7, 1941) during any part of which he was a member of such forces; and

"(b) the tax under this chapter and under the corresponding title of each prior revenue law for taxable years preceding those specified in clause (a) which is unpaid at the date of his death (including interest, additions to the tax, and additional amounts) shall not be assessed, and if assessed the assessment shall be abated, and if collected shall be credited or refunded as an overpayment."

his death, and to his estate $8,184.05, being his share of the income for the period January 7 to June 30, 1945. No income tax was paid, and none is claimed on the first sum. Lupia's executors reported the $8,184.05 in a timely estate income tax return, and paid a tax thereon of $2,039.52, which they subsequently sought to recover in a refund suit against the Collector. The District Court granted summary judgment in favor of the estate, from which the Collector appeals.

For the Collector, it is contended that § 421 limits the forgiveness of income taxes to those payable for the period up to the date of the serviceman's death. Lupia's executors contend that the Statute forgives income taxes for the *full* taxable year in which death occurred.

The question has been the subject of conflicting decisions. Prior to the decision below, the taxpayer's position was upheld by former Judge Kennedy on a motion to dismiss the complaint in this action. *Lupia's Estate* v. *Marcelle*, 107 F. Supp. 552 (E. D. N. Y. 1952). The Court of Appeals for the Fifth Circuit, which Judge Byers declined to follow in the present case, has gone the other way. *Allen* v. *Bickerstaff*, 200 F. 2d 181 (5th Cir. 1952).

The position of the Collector rests largely upon a technical reading of the Statute. His argument is that since a decedent and his estate are separate taxable entities, and since § 421 applies
70 only "in the case of any *individual*,"[2] the taxes forgiven are only those which relate to the period up to the date of the serviceman's death.

We think such a reading of the Statute too narrow and that it does violence to the ordinary meaning of the language used. The Statute forgives "the tax imposed * * * with respect to *the* taxable year *in which falls* the date of his death." To us this means the tax for the *full* taxable year in which death occurs. The Collector would have us interpret this provision as if it read "the tax imposed with respect to *that portion* of the taxable year *ending* with the date of his death." If we are to be technical, it seems reasonable to suppose that language of that import would have been used had the Congressional intent been the limited one which the Collector suggests. To overcome this difficulty, the Collector relies upon § 48(a), I. R. C., 26 U. S. C. A. § 48(a), which states that in the case of a return made for a fractional part of a year, "taxable year" as used in Chapter 1 means the period for which such return is made. This definition might conceivably have some application had Congress in § 421, limited relief to the deceased serviceman's "last taxable year." But the use of the phrase "taxable year in which falls the

[2] Italics throughout this opinion have been supplied unless otherwise indicated.

date of his death" contemplates, we think, the existence of a period which may extend beyond the serviceman's death, *i.e.*, his normal taxable year.

In our view, the phrase "In the case of any individual" was simply intended to refer to the category of those members of the Armed Forces embraced within the forgiveness provisions—that is those losing their lives in service on or after Pearl Harbor day and before January 1, 1948—and was not intended to draw a distinction between the income taxes of such an individual and those of
71 his estate with respect to the taxable year in which death occurred.

Our interpretation of § 421 seems to be in accord with Congressional pronouncements as to the purpose of the Statute. In the report of the House Committee on Ways and Means on the 1947 Amendment, it was stated that "no income tax is imposed for the taxable year in which" a member of the Armed Forces dies. H. Rep. No. 1006, 80th Cong., 1st Sess., pp. 1-2; U. S. Code Cong. & Admin. Serv., p. 1612. Likewise when § 154 of the present Internal Revenue Code (26 U. S. C. A. § 154) was passed in 1951 to extend the § 421 tax relief to service personnel losing their lives in the Korean War, the Senate Report stated that under § 421 members of the Armed Forces "were forgiven their income tax with respect to the year of the death * * *" and described one of the purposes of the new legislation as being "the forgiving of income tax in the year of death of such individuals * * *" S. Rep. No. 781, 82d Cong., 1st Sess.; U. S. Code Cong. & Admin. Serv., p. 2023. Moreover, the Treasury Regulation which deals with § 421 also appears to construe the statute as we do when it states: "the tax liability in the case of such individual * * * for the taxable year *in which* occurs the date of death is cancelled * * *" T. R. 111, § 29.421-1, 1948-2 Cum. Bull. 14, 24.

The Collector's narrow construction of § 421 also appears to be gainsaid by the broad sweep of its other provisions, as originally enacted and subsequently expanded. As originally passed, § 421 forgave not only those income taxes imposed for the taxable year in which death occurred, but also those due for any prior year which were *unpaid* at the time of death, even though such unpaid taxes related to a taxable year ending prior to December 7, 1941, or to a year when the deceased serviceman was not a member of the Armed Forces. And if such unpaid taxes were later collected,
72 they were refundable. The 1947 amendment enlarged this relief by relieving such a deceased individual from, and making refundable, *all* income taxes paid for any taxable year ending on or after December 7, 1941 "during *any part of which*" the deceased was in the Armed Forces. And § 345 of the Revenue Act of 1951, 65 Stat. 517, C. 521, 26 U. S. C. A., Cum. Supp. § 345,

enacted after the decision in *Lloyd* v. *Delaney*, 181 F. 2d 941 (1st Cir. 1950) holding § 421 inapplicable to undistributed trust income, still further extended the scope of income tax relief accorded deceased servicemen so as to embrace, within certain limits, trusts for their benefit in respect of income accumulated at their death which was payable to their estates or lineal next of kin.

Thus, the march of this remedial legislation has ever been forward. One way of putting the Collector's position here is that it attributes to § 421 a purpose to equate the scope of the tax forgiveness with the end of a soldier's service during the taxable year in which he died. But since § 421 clearly does not equate the *beginning* date of forgiveness with commencement of a deceased soldier's service, it seems unlikely that such an equation was intended with respect to its *ending* date by death. So far as the supposed distinction between individual and estate income taxes is concerned, it is clear that the refunding provisions of § 421 can only enure to the benefit of the serviceman's estate. And it is difficult to reconcile the purpose of the 1947 amendment of § 421, *i.e.*, to put deceased servicemen who had paid their income taxes for previous taxable years ending after December 7, 1941 on the same basis with those who had not paid their taxes for such years (see Report of House Committee on Ways and Means, *supra*), with a construction which would make the extent of the tax relief for the taxable year in which death occurred depend upon the circumstance of when
73 the serviceman happened to die.

We do not consider *Lloyd* v. *Delaney*, *supra*, at all apposite. As Judge Wyzanski noted in his opinion in the District Court, there is a great difference between a construction of the Statute which would apply it to undistributed *trust* income, and one which "accords with its purpose of giving a benefit to the estate of a deceased serviceman." 86 F. Supp., at p. 1002. Here Lupia's estate seeks exemption from a tax which would have fallen on Lupia himself had he survived. But even if the deceased serviceman in the *Delaney* case had survived, it is clear that he would have incurred no tax liability with respect to the income accumulated in the trust, for which the trust sought exemption.

We are unable to agree with the decision of the Fifth Circuit in *Allen* v. *Bickerstaff*, *supra*, and must respectfully decline to follow it. We hold that § 421 forgives the income taxes of a deceased serviceman, coming within its provisions, for the full taxable year in which death occurred.

Affirmed.

74 In United States Court of Appeals for the Second Circuit

ESTATE OF RAYMOND LUPIA, ET AL., *Plaintiffs-Appellees*,

*v.*

JOSEPH P. MARCELLE, *Defendant-Appellant*

JUDGMENT—July 2, 1954

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO,
*Clerk.*

(File endorsement omitted)

76 Clerk's Certificate to foregoing transcript omitted in printing.

77 Supreme Court of the United States, October Term, 1954

No. 368

(Title omitted)

ORDER ALLOWING CERTIORARI—Filed November 15, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 325551 781